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Justices Divided on Protections Over Wetlands

By [LINDA GREENHOUSE](#)

WASHINGTON, June 19 — The Supreme Court on Monday came close to rolling back one of the country's fundamental environmental laws, issuing a fractured decision that, while likely to preserve vigorous federal enforcement of the law, the Clean Water Act, is also likely to lead to new regulatory battles, increased litigation by property owners and a push for new legislation.

With four justices on one side arguing for a sharp restriction in the definition of wetlands that are subject to federal jurisdiction, and four justices on the other arguing for retaining the broad definition that the [Army Corps of Engineers](#) has used for decades, Justice [Anthony M. Kennedy](#) controlled the outcome in a solitary opinion.

Justice Kennedy said that to come within federal protection under a proper interpretation of the Clean Water Act, a wetland needs to have a "significant nexus" to a body of water that is actually navigable.

He then made clear, in his 30-page opinion, that whether such a relationship existed in any specific case was largely a technical and scientific judgment on which courts should defer to the federal regulators. The four parcels of land at issue in the case, all in Michigan, were likely to meet the definition, he said.

Environmental advocacy groups reacted to the decision, which sends the cases back to an appeals court, as if they had dodged a bullet, which in many respects they had. An opinion for four justices, written by Justice [Antonin Scalia](#), would have stripped protection from many areas that federal regulators have treated as wetlands under the 1972 law.

Justice Scalia's opinion, joined by Chief Justice [John G. Roberts Jr.](#) and by Justices [Clarence Thomas](#) and [Samuel A. Alito Jr.](#), said the Army Corps of Engineers had stretched its authority under the Clean Water Act "beyond parody" by regulating land that contained nothing but storm sewers, drainage ditches and "dry arroyos in the middle of the desert."

He said the agency had trampled on state authority by exercising a "scope of discretion that would befit a local zoning board."

The only wetlands properly subject to federal jurisdiction, Justice Scalia said, are those "with a continuous surface connection" to actual waterways, "so that there is no clear demarcation between 'waters' and wetlands."

The waters to which the wetlands must be adjacent, he continued, are only those that are "relatively permanent, standing or flowing." These are the only bodies of water that come within the statute's reference to "the waters of the United States," he said.

On the other side was Justice [John Paul Stevens](#), joined by Justices [David H. Souter](#), [Ruth Bader Ginsburg](#) and [Stephen G. Breyer](#). Accusing the Scalia group of "antagonism to environmentalism," Justice Stevens said the Scalia opinion "needlessly jeopardizes the quality of our waters."

Further, Justice Stevens said, the Scalia group "disregards the deference it owes the executive" as well as "its own obligation to interpret laws rather than to make them."

This, of course, was a sly reference to the slogan often heard in connection with conservative nominations to the federal courts. In effect, Justice Stevens was accusing the Scalia group of judicial activism.

The case, which was argued in February and was the oldest undecided case on the court's docket, was clearly the subject of a major internal battle that undercut any image of good fellowship and unanimity on the Roberts court.

The chief justice himself wrote a brief concurring opinion, noting that "it is unfortunate that no opinion commands a majority of the court." He added: "What is unusual in this instance, perhaps, is how readily the situation could have been avoided."

It was not clear whether he was aiming this comment at Justice Kennedy or at the Army Corps of Engineers, which he said had failed to respond properly to a Supreme Court decision five years ago that rejected federal jurisdiction under the Clean Water Act

over isolated ponds visited by migratory birds.

The chief justice noted that the Army Corps had embarked after that decision on issuing new, more limited regulations, but had abandoned the effort. "Rather than refining its view of its authority in light of our decision," he said, "the Corps chose to adhere to its essentially boundless view of the scope of its power." He concluded: "The upshot today is another defeat for the agency."

Given Justice Kennedy's refusal to go along, the extent of that defeat was far from certain. At the least, the Army Corps of Engineers may now feel impelled to embark on a new rulemaking process, leading to a regulation that would incorporate Justice Kennedy's "significant nexus" test.

Under that test, regulators need not show that a wetland is adjacent to, or connected with, a navigable body of water. Rather, it is sufficient to show that it is adjacent to a tributary that itself flows into such waters.

Justice Kennedy said the Corps needed to be more specific in defining the tributaries that count for this purpose. He said it needed to identify those "categories of tributaries" that were "significant enough that wetlands adjacent to them are likely, in the majority of cases, to perform important functions for an aquatic system incorporating navigable waters."

The current standard used by the Corps, he said, was too open-ended in permitting regulation of remote drains, ditches and streams that did not affect "the integrity of an aquatic system."

The impact of this approach will become more clear when the appeals court, the United States Court of Appeals for the Sixth Circuit, in Cincinnati, revisits the two decisions that the Supreme Court vacated. With Justice Kennedy agreeing that the appeals court needed to take a fresh look at the cases, there were five votes for a judgment to "vacate and remand."

But as Justice Stevens pointed out, one "unusual feature" of the judgment was that there were not five votes for the standard that the appeals court should apply. The judgments should be reinstated as long as the appeals court finds that Justice Kennedy's test is met, disregarding the test proposed by Justice Scalia, Justice Stevens said.

The appeals court, in two separate cases, ruled against Michigan property owners in their battles with federal regulators. In the lead case, *Rapanos v. United States*, No. 04-1034, John A. Rapanos, after being informed that three parcels he wanted to develop probably contained regulated wetlands, cleared and filled the land without obtaining a Clean Water Act permit.

The government brought criminal charges against Mr. Rapanos. He was convicted, and the Supreme Court denied review of his case in 2004. The case the court decided on Monday grew out of his appeal in a civil case the government brought against him, in which he faces millions of dollars in fines.

His property is as much as 20 miles away from water that is navigable in the traditional sense. But the parcels are within the drainage systems of Lake Huron and two navigable rivers.

In the second case, *Carabell v. United States Army Corps of Engineers*, No. 04-1034, the Army Corps denied a permit to a couple who wanted to fill part of their property in order to develop condominiums.

In both cases, the property owners challenged the jurisdiction of the Army Corps both under the Clean Water Act and under the Constitution, arguing that if Congress had conferred such broad jurisdiction in the Clean Water Act, it exceeded its authority under the Commerce Clause.

Justice Scalia's opinion, without directly endorsing the constitutional attack, said the agency's interpretation of its authority "stretches the outer limits of Congress's commerce power." Justice Kennedy, however, said that wetlands as defined by his test "raise no serious constitutional or federalism difficulty."

However the case unfolds from here, it was plain that something went awry in the court's handling of its most high-profile environmental case in years.

Given the structure of the principal opinions, including their relative length and tone, it is possible that Justice Stevens had initially controlled the case and, on the assumption that he had five votes on his side, had assigned it to Justice Kennedy, who then strayed somewhat from the more categorical view of the Stevens four. Although he speaks only for himself, his opinion reads like a majority opinion, while Justice Scalia's opinion reads like a dissent.

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